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Nos. 99-603 and 99-960

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LEGAL SERVICES CORPORATION,

Petitioner,

—v.—

CARMEN VELAZQUEZ, *et al.*,

Respondents.

UNITED STATES OF AMERICA,

Petitioner,

—v.—

CARMEN VELAZQUEZ, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER LEGAL SERVICES CORPORATION

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QUESTION PRESENTED

Whether Congress's decision to subsidize some legal services (to help individuals obtain all the benefits to which they are entitled under existing welfare laws) but not other legal services (to pursue broad-based litigation challenging reform of the welfare laws) violates the First Amendment's prohibition on viewpoint-based suppression of speech.

PARTIES TO THE PROCEEDING

Three sets of litigants were parties to this case in the courts below: the plaintiffs, the defendant Legal Services Corporation, and the intervenor-defendant United States. The plaintiffs were Carmen Velazquez, WEP Workers Together; Community Service Society of New York, Inc.; New York City Coalition to End Lead Poisoning; Centro Independiente De Trabajadores, Agricolas, Inc.; Greater New York Labor-Religion Coalition; Farmworkers Legal Services of New York, Inc.; Peggy Earisman; Olive Karen Stamm; Jeanette Zelhof; Elisabeth Benjamin; Lauren Shapiro; Andrew J. Connick; C. Virginia Fields; Guillermo Linares; Stanley Michels; Adam Clatyon Powell, Jr. IV.; Lawrence Seabrook; and Scott M. Stringer. Two former plaintiffs, Lucy A. Billings and Jill Ann Boskey, are no longer parties to the proceedings.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 164 F.3d 757 (2d Cir. 1999), and is set forth in the Appendix to LSC's Petition for a Writ of Certiorari ("Pet. App. (99-603)") at 1a-41a. The order of the court of appeals denying the petitions for rehearing is dated July 8, 1999 and is set forth at Pet. App. (99-603) at 42a-43a. The opinion of the United States District Court for the Eastern District of New York denying the motion for a preliminary injunction is reported at 985 F. Supp. 323 (E.D.N.Y. 1997), and is set forth at Pet. App. (99-603) at 44a-84a.

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on January 7, 1999 and denied the petitions for rehearing on July 8, 1999. LSC filed its petition for a writ of certiorari on October 5, 1999, which was granted on April 3, 2000. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The following constitutional provisions, statutes and regulations are involved in this case:

1. United States Constitution, Amendment I;
2. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321;
3. Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 110 Stat. 3009;
4. Department of Commerce, Justice and State, The Judiciary and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, 111 Stat. 2440; and

5. Legal Services Corporation, "Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity," 45 C.F.R. Part 1610 (1997).

STATEMENT OF THE CASE

In appropriating funds for distribution to legal aid organizations, Congress has chosen to subsidize bread-and-butter legal services for individuals seeking benefits under existing welfare laws (so-called "suits for benefits"), but not broad-ranging litigation that challenges reform of the welfare laws. By a two-to-one vote, the United States Court of Appeals for the Second Circuit declared this "suit-for-benefits" limitation impermissible viewpoint-based discrimination under the First Amendment to the United States Constitution, and directed the District Court to enjoin petitioner Legal Services Corporation, which administers the federally subsidized civil legal services program, from enforcing the limitation. The facts governing respondents' facial challenge are as follows:

A. Congress Creates the LSC Program to Provide Basic Legal Services to the Needy

In 1974, Congress created the Legal Services Corporation ("LSC"), an independent, District of Columbia non-profit corporation, to distribute federal funds to "qualified programs furnishing legal assistance to eligible clients." Pub. L. No. 93-355, 88 Stat. 378 (1974) (*codified as amended*, 42 U.S.C. §§ 2996 *et seq.* (1994)) (the "LSC Act"). To carry out this mission, LSC distributes funds annually appropriated by Congress to eligible local grantee organizations. 42 U.S.C. §§ 2996b(a) and 2996e(a).

From the beginning, Congress viewed the primary purpose of the LSC program as providing "traditional legal representation for the poor." H.R. Rep. No. 95-310, at 34 (1977)

(views of Rep. McClory). Thus, Congress intended the program to emphasize the "legal problems of eligible clients fall[ing] into four broad categories: family law; administrative benefits, including Medicaid, AFDC, and SSI; consumer law; and housing law." S. Rep. No. 95-172, at 3 (1977). As one Member of the House opined, lawyers in programs funded by LSC should be "preoccupied with day-to-day problems involving housing, domestic relations, consumer affairs and employment" and should not be "spending their time reforming laws they find discriminatory against the poor through class action and test-case litigation." 119 Cong. Rec. 20,688 (1973) (statement of Rep. Biester).

To focus the LSC program on basic litigation for the poor, Congress expressly limited the scope of the program. For example, the statute barred LSC grantees from participating in litigation concerning school desegregation and "draft dodgers." *Id.* §§ 2996f(b)(8) and (10). The LSC Act also prohibited most criminal representation and limited civil litigation involving prisoners, class actions, and fee-generating cases. *Id.* §§ 2996e(d)(5) and 2996f(b)(1)-(4). Moreover, to insure that the program "be kept free from the influence of or use by it of political pressures," 42 U.S.C. § 2996(5), the LSC Act barred political activity and restricted lobbying by LSC or its grantees. 42 U.S.C. §§ 2996e(d)(3) (prohibiting campaign contributions by LSC grantees); 2996e(d)(4) (prohibiting activities "advocating or opposing any ballot measures, initiatives, or referendums"); and 2996f(5) (restrictions on lobbying). Most of these restrictions applied to LSC grantees even if the activities in question were funded by private donations. *Id.* § 2996i(c). *See also* C.A.J.A.[1] 297-98 (¶¶ 3-8).[2]

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[1] Citations to "C.A.J.A." are to the Joint Appendix submitted in connection with the Second Circuit appeal below.

[2] *See also* S. Rep. No. 95-172, at 7 (1977) ("[§ 2996i(c)] imposes the same prohibitions on funds received from private sources

Congress believed these restrictions were necessary to keep the program apolitical: "[P]art of the reason for [LSC's] success in avoiding the 'political thicket' and controversy has been some of the restrictions we placed in the original act of 1974." H.R. Rep. No. 95-310, at 31 (1977) (Rep. Butler). *See also Smith v. Ehrlich*, 430 F. Supp. 818 (D.D.C. 1976) (upholding prohibition on LSC lawyers running for political office); *Texas Rural Legal Aid, Inc. v. Legal Services Corp.*, 940 F.2d 685 (D.C. Cir. 1991) (upholding regulation barring redistricting activities).

B. Congress Decides to Continue Funding the LSC Program As Long As the Program Focuses on Basic Legal Services

Despite these restrictions, some members of Congress came to believe that LSC was under the influence of "liberal activists who favor a militant agenda." 141 Cong. Rec. S14,592 (Sept. 29, 1995). *See also* Pet. App. (99-603) at 48a-49a. In the mid-1990s, some of these representatives attempted to eliminate LSC entirely.

In 1996, rather than cease funding for LSC, Congress enacted compromise legislation that imposed new restrictions designed to refocus LSC on its central mission: "to ensure that funding is used to provide the traditional legal services that are most needed by poor people." 141 Cong. Rec. S14,605 (Sept. 29, 1995) (Sen. Stevens). *See also* S14,590 ("[T]hese restrictions provide the necessary guidance to take Legal Services back to its primary mission." (Sen. Kassebaum)); 142 Cong. Rec. H8178 (July 23, 1996) ("the purposes which we all endorsed [were] to meet the day-to-day legal problems of the poor.") (Rep. Fox); H8180 ("[T]hey are supposed to be doing the ham and eggs work for poor people.") (Rep. Hunter); 142 Cong. Rec. H8189

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as those that are imposed on funds received from [LSC]"); 45 C.F.R. pts. 1610, 1627 (1995); 45 C.F.R. § 1610.1 (1976).

(July 23, 1996) (emphasizing "bread-and-butter services") (Rep. Torkildsen); 141 Cong. Rec. S18,160 (Dec. 7, 1995) (emphasizing "such routine legal matters as consumer problems, housing issues, domestic and family cases, and . . . public benefits") (Sen. Sarbanes).

The new restrictions, which were incorporated in the 1996 Omnibus Appropriations Act, Pub. L. No. 104-134, 110 Stat. 1321 (the "1996 Act"),[3] were designed to prevent federal funds from subsidizing, for example, class action litigation or cases in which attorneys' fees are sought; representations of certain aliens or incarcerated persons; or certain lobbying and advocacy activities. 1996 Act §§ 504(a)(2)-(4), (7), (11), (13), (15), and (18).

The congressional debates make clear that the 1996 compromise legislation was intended to save LSC and preserve its original focus and mission. As Senator Domenici, one of the principal architects of the legislation, stated: "While some may not like these restrictions, they are necessary to . . . protect LSC from the negative perceptions of those who wish to see its termination." 142 Cong. Rec. S1963 (Mar. 13, 1996). *See also* 141 Cong. Rec. S14,607 (Sep. 29, 1995) ("[M]any of these restrictions are necessary to ensure that the program as a whole is supported and funded.") (Sen. Lautenberg); S14,612 ("[S]ome restrictions are necessary to ensure support for the program. . . . The [compromise] . . . would correct the harsh injustice of the committee bill and enable [LSC] to continue its important work.") (Sen. Kennedy).

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[3] The restrictions were continued in subsequent legislation in 1997 (Pub. L. No. 104-208, 110 Stat. 3009) and 1998 (Pub. L. No. 105-119, 111 Stat. 2440). For ease of reference, we will refer to only the 1996 Act. The relevant portions of each statute are set forth at Pet. App. (99-603) at 85a-111a.

C. The Suit-for-Benefits Limitation

Included in the new 1996 restrictions was the "suit-for-benefits" limitation that the court of appeals ultimately declared unconstitutional, and that is the sole issue before this Court.

Section 504(a)(16) of the 1996 Act denies funding to any entity "that initiates legal representation or participates in any other way in litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system. . . ." This section includes an exception to this limitation *permitting* an LSC-funded lawyer to represent "an eligible client who is seeking specific relief from a welfare agency if such relief does not involve an effort to amend or otherwise challenge existing law in effect on the date of the initiation of representation." *Id.* This exception confirms the ability of LSC-funded lawyers to bring a suit for welfare benefits, *i.e.*, to represent an individual seeking specific relief from a welfare agency, so long as that representation does not run afoul of the general prohibition on participating in efforts to reform a welfare law.

Although the precise contours of Section 504(a)(16) have never been tested, LSC has enacted regulations that explain more precisely the activities that are *prohibited*:

> (a) Litigation challenging laws or regulations enacted as part of an effort to reform a Federal or State welfare system;
>
> (b) Rulemaking involving proposals that are being considered to implement an effort to reform a Federal or State welfare system; and
>
> (c) Lobbying before legislative or administrative bodies undertaken directly or through grassroots efforts involving pending or proposed legislation that is part of an effort to reform a Federal or State welfare system.

45 C.F.R. § 1639.3 (1997). Thus, insofar as litigation is concerned, LSC lawyers cannot take on representations involving claims that would challenge a welfare reform law that has already been enacted.

Notwithstanding this restriction, LSC grantees can represent clients who will raise a broad variety of claims for benefits under existing welfare law:

> [W]hen representing an eligible client seeking individual relief from the actions of an agency taken under a welfare reform law or regulation, a recipient may challenge an agency policy on the basis that it violates an agency regulation or State or Federal law or challenge the application of an agency's regulation, or the law on which it is based, to the individual seeking relief.

Preamble to Final Rule 45 C.F.R. Part 1639, 62 Fed. Reg. 30,763, 30,765-66 (June 5, 1997). Thus, an LSC grantee can represent a welfare claimant who will maintain, for instance, that an agency policy violates existing law; that an agency made an erroneous factual determination under existing welfare law; or that an agency misread or misapplied a term contained in an existing welfare law.

In sum, although LSC lawyers cannot take on representations designed to *change* welfare laws, they are free to help clients obtain welfare benefits to which they are entitled under the *existing* welfare laws. This is precisely the type of representation that falls within LSC's mandate to provide basic legal services to the poor.[4]

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[4] If an LSC funded lawyer represents a client who originally brings a suit for benefits, but subsequently decides to challenge a welfare reform law, the lawyer should discontinue the representation "consistent with the applicable rules of professional responsibility." *Cf.* 45 C.F.R. § 1626.9 (1997) (governing changes of circumstances in representations of eligible aliens). This provision is consistent with LSC's statutory mandate to "ensure that activities under this

D. In Response to Litigation, LSC Issues "Program Integrity" Regulations that Leave Adequate Alternative Channels for LSC Grantees to Bring Reform-Oriented Welfare Litigation

In a span of several weeks in late 1996 and early 1997, plaintiffs in the District of Hawaii and the Eastern District of New York filed two separate motions for preliminary injunctions seeking to enjoin LSC from enforcing many of the restrictions in the 1996 Act. The plaintiffs included LSC organizations, lawyers, clients, and donors, who argued that the 1996 restrictions, in combination with LSC's then-existing regulations, violated various constitutional rights.

The Hawaii district court ruled first. On February 14, 1997, it imposed a preliminary injunction enjoining LSC from enforcing some of the congressional restrictions under LSC's then applicable "interrelated organizations" policy. *Legal Aid Society of Hawaii v. Legal Services Corporation*, 961 F. Supp. 1402, 1410-11 (D. Haw. 1997) (*"LASH I"*). Specifically, the court focused on whether LSC's interrelated organizations policy, which was designed to regulate the relationship between LSC grantees and separate affiliate organizations that engaged in unsubsidized activities, left LSC grantees with adequate alternative channels for engaging in the restricted activities with non-federal funds. *Id.* at 1414-17. After comparing LSC's interrelated organizations policy with federal "program integrity" regulations upheld in *Rust v. Sullivan*, 500 U.S. 173 (1991), the Hawaii court found that LSC grantees did not have adequate alternative avenues for engaging in restricted First Amendment activities. *Id.* Based on this finding, the court held that the *LASH*

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subchapter are carried out in a manner consistent with attorneys' professional responsibilities." 42 U.S.C. § 2996e(b)(3); *see also* 42 U.S.C. § 2996(6). Thus, after the 1996 restrictions were passed, LSC lawyers withdrew from numerous matters in an orderly manner. C.A.J.A. 320-21, ¶4.

plaintiffs had a fair likelihood of showing that the government had imposed an unconstitutional condition on their receipt of federal subsidies. *Id.* at 1416-17.

In response to the Hawaii district court's ruling, and while respondents' motion for a preliminary injunction was still pending in the New York district court, LSC published interim rules that revised its previous interrelated organizations policy. C.A.J.A. 322-24 and 356-59. Although the revised rules included physical and financial separation requirements modeled after those upheld by this Court in *Rust* (C.A.J.A. 495 and 507), the revised rules were not identical to those upheld in *Rust*, as the New York district court noted at oral argument. Pet. App. (99-603) at 61a-63a.

In response to comments made at oral argument before the district court for the Eastern District of New York, and after receiving public comments on the new interim rules, LSC revised its rules again, and issued final rules that it denominated "program integrity" regulations. 45 C.F.R. pt. 1610.[5] These rules eliminated the "interrelated organizations" policy completely, and removed minor variations in wording between the interim rules and the program integrity regulations previously approved by this Court in *Rust*.

The final program integrity rules permit an LSC grantee to establish a separate affiliate organization to pursue restricted activities as long as the affiliate has "objective integrity and independence" from the LSC grantee. 45 C.F.R. § 1610.8(a). For the LSC grantee and the affiliate to have "objective integrity and independence," the two organizations must be "legally separate;" the affiliate must receive "no transfer of LSC funds" so that "LSC funds do not subsidize restricted activities;" and the two organizations must be "physically and financially separate." *Id.*

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[5] These regulations are set forth at Pet. App. (99-603) at 112a-132a.

Moreover, for the two organizations to be physically and financially separate, "mere bookkeeping separation of LSC funds from other funds is not sufficient." 45 C.F.R. § 1610.8(a)(3). Rather, physical and financial separateness will be based on consideration of several non-dispositive, non-exclusive factors, including: the "existence of separate personnel;" the "existence of separate accounting and time-keeping records;" the "degree of separation from facilities in which restricted activities occur, and the extent of such restricted activities"; and the "extent to which signs and other forms of identification which distinguish the recipient from the [affiliate] organization are present." *Id.*

These regulations permit LSC grantees to establish separate affiliate organizations to engage in the activities that Congress chose not to fund, as long as federal funds do not indirectly subsidize those activities, and it does not appear that Congress is funding those activities.

E. LSC's Regulations Also Allow LSC Lawyers and Potential Clients to Conduct Welfare Reform Litigation Outside the Program

Although LSC modeled its program integrity regulations after the program integrity regulations upheld in *Rust*, LSC's regulations do not include the other restrictions at issue in *Rust*, which limited the advice that federally subsidized doctors and nurses could give their patients.

For example, if a lawyer in an LSC-funded program determines that a prospective client should pursue a litigation strategy that the LSC-funded lawyer is prohibited from pursuing, the LSC lawyer can advise the client of his or her right to pursue this strategy through an attorney employed by an organization outside the LSC program. Pet. App. (99-603) at 65a-66a and 82a. Thus, although the LSC grantee cannot represent the client, the prospective client still enjoys

the benefit of a fully informed consultation with an LSC attorney.

After advising the prospective client of his or her right to pursue a litigation outside the scope of the LSC program, the LSC-funded lawyer can even refer the prospective client to a lawyer who can handle the matter. *Id.* As a result, Congress' decision not to subsidize lawsuits challenging welfare reform does not inhibit prospective clients from filing such lawsuits outside the LSC program.

Moreover, the regulations do not prohibit part-time employees of LSC grantees—including lawyers—from participating in the restricted activities as employees of non-LSC funded organizations. C.A.J.A. 294-95. Thus, a lawyer employed part-time by an LSC grantee can participate in a reform-oriented welfare litigation while separately employed by a non-LSC funded organization.

Finally, full-time employees of LSC-funded organizations are free to engage in the restricted "advocacy" activities in their individual capacity, on their own behalf, and on their own time. *Id.* As a result, LSC-funded attorneys can express their personal opposition to existing welfare laws, and their personal views on welfare reform, as long as these unsubsidized activities occur outside the LSC program.

F. The District Courts Deny Respondents' Motions for Preliminary Injunctions

On August 1, 1997, after considering the impact of LSC's revised final rules on its initial ruling, the Hawaii court dissolved its earlier injunction, and granted LSC summary judgment. *Legal Aid Society of Hawaii v. Legal Services Corporation*, 981 F. Supp. 1288 (D. Haw. 1997) (*"LASH II"*). That decision was unanimously affirmed by the Court of Appeals for the Ninth Circuit. *Legal Aid Society of Hawaii v. Legal Services Corporation*, 145 F.3d 1017 (9th Cir.), *cert. denied*, 525 U.S. 1015 (1998) (*"LASH III"*).

On December 22, 1997, the New York district court also denied respondents' motion for a preliminary injunction (Pet. App. (99-603) at 44a-84a), relying heavily on LSC's decision to revise its regulations in accordance with *Rust*. *Id.* at 83a. The district court held that the regulations permitted adequate alternative channels for LSC grantees to conduct restricted activities, and were a permissible attempt by LSC to guard against the appearance that Congress was supporting the restricted activities. *Id.* at 72a-75a. The court also found that "the restrictions pertaining to LSC recipients do not significantly impinge on the lawyer-client relationship. . . . Indeed, they simply proscribe the activities in which LSC recipients may engage." *Id.* at 81a. The district court rejected Respondents' attempt to distinguish the doctor-patient relationship considered in *Rust* from the lawyer-client relationship at issue here. *Id.*

G. The Court of Appeals for the Second Circuit Upholds Almost All of the Congressional Restrictions

On appeal, the Court of Appeals for the Second Circuit unanimously affirmed the lower court's ruling in all but one respect. In upholding almost all of the congressional restrictions, the court recognized several important principles.

Most important, the court of appeals acknowledged Congress' power to subsidize some services but not others:

> Just as Congress is entitled to provide a limited range of medical services under Title X, it is free to offer a limited menu of legal services under the LSCA.

Pet. App. (99-603) at 15a.

Accordingly, the court of appeals rejected Respondents' claim that the regulations interfered with the "associational bond" between lawyers and their clients. In denying this claim, the court held:

> Even if we assume that an "all-encompassing" lawyer-client relationship enjoys heightened protection from government regulation, the lawyer-client relationships funded by LSC are no more "all-encompassing" than the doctor-patient relationships funded under Title X, which were considered in *Rust*. As noted above, the LSCA has always limited the range of legal services available through LSC grantees. . . . Because grantee lawyers are bound to explain to prospective and actual clients the limitations imposed by the 1996 restrictions, and may refer clients to lawyers unencumbered by the restrictions, there is no reason to fear that clients will detrimentally rely on their LSC lawyers for a full range of legal services. The LSC lawyer-client relationship cannot, therefore, be considered "sufficiently all-encompassing so as to justify an expectation on the part of the [client] of comprehensive [legal] advice."

Pet. App. (99-603) at 14a (quoting *Rust*, 500 U.S. at 200). The dissent agreed. Pet. App. (99-603) at 36a.

The court of appeals also held that most of the challenged restrictions were viewpoint-neutral as to speech. Pet. App. (99-603) at 20a-23a.

Finally, the court recognized that "Congress may burden the First Amendment rights of recipients of government benefits if the recipients are left with adequate alternative channels for protected expression." Pet. App. (99-603) at 17a. The court of appeals held that even if the congressional restrictions burden First Amendment activity, LSC's newly promulgated program integrity regulations allow sufficient alternative channels for protected expression, at least insofar as this facial challenge is concerned. *Id.* at 15a-20a.

H. The Court of Appeals Declares the Suit-for-Benefits Limitation an Unconstitutional Viewpoint-Based Infringement of Speech

Despite upholding several restrictions on the activities conducted by LSC grantees, the court of appeals held that the suit-for-benefits limitation constitutes unconstitutional viewpoint-based discrimination against speech. In so holding, the court of appeals construed the suit-for-benefits limitation as a "muzzle" on one of the most protected forms of expression (criticism of governmental policy) in a public forum for that expression (the courtroom). Pet. App. (99-603) at 27a-28a. As the dissenting judge explained, this holding was erroneous.

An important premise of the majority opinion was that an LSC-funded lawyer's argument is part of debate in a "public forum," because the courtroom is "the prime marketplace" for the idea that governmental policy is unconstitutional or illegal. Pet. App. (99-603) at 28a. But the LSC program, not the courtroom, is the proper focus of the forum analysis, and the LSC program is not a public forum. As the dissent stated, "a defined program of legal representation to indigent clients . . . does not underwrite the expression of the private speech or viewpoints of its grantees or their lawyers, or (for that matter) their clients." Pet. App. (99-603) at 37a.

Of course, as the dissent noted, even if the courtroom were the proper forum to consider, it is not a public forum either. Pet. App. (99-603) at 40a (Dissent: "According to the majority opinion: the government-funded lawyers possess the protected expressive interest; and the public forum is the courtroom (an idea that may come as a surprise to trial judges).").

The court of appeals also held that "a lawyer's argument to a court that a statute, rule, or governmental practice . . .

is unconstitutional or otherwise illegal falls far closer to the First Amendment's most protected categories of speech than abortion counseling or indecent art." Pet. App. (99-603) at 27a. As Judge Jacobs explained in his dissent, however, when lawyers advocate on behalf of their clients, the lawyers are not expressing their own political or ethical views; they are simply providing services. *Id.* at 39a-41a. A lawyer's argument does not implicate the lawyer's First Amendment rights.

Based on the assumption that the courtroom is a public forum for the First Amendment speech of lawyers, the court of appeals concluded that the suit-for-benefits limitation was "viewpoint-based" discrimination that "clearly seeks to discourage challenges to the status quo." Pet. App. (99-603) at 24a. In so holding, the majority expressly disregarded the central holding of *Rust* (a decision to "selectively fund a program . . . [does] not discriminate[ ] on the basis of viewpoint") with an expression of "doubt that these words can reliably be taken at face value." *Id.* at 25a. Thus, the majority dismissed *Rust's* holding as "a judicial precedent in a relatively unexplored area of law." *Id.*

After questioning the majority's "approach to Supreme Court opinions," the dissent explained that in the context of this program for services, the majority could not coherently identify a disfavored viewpoint, forum, or speaker. *Id.* at 38a-41a.

Finally, the Second Circuit speculated that if a welfare claimant originally brought a suit-for-benefits through an LSC lawyer, but then decided to amend the complaint to challenge a welfare reform law, the LSC lawyer would have to withdraw, severely prejudicing the client. Pet. App. (99-603) at 28a n.9. But, as the dissent noted, the majority should not have presumed prejudice on this facial challenge. Pet. App. (99-603) at 35a-36a. *See also supra* at p. 7, n.4.

I. The Petition for Certiorari

On October 5, 1999, LSC filed a petition for a writ of certiorari seeking review of the majority's decision reversing the district court's refusal to grant a preliminary injunction as to the suit-for-benefits limitation. The petition was granted on April 3, 2000. *Legal Services Corporation v. Velazquez*, 120 S. Ct. 1553 (2000). This Court also granted the petition filed by the United States as intervenor, and consolidated the two cases. *Id.*[6]

SUMMARY OF ARGUMENT

This case concerns Congress's power to control the use of federal funds by defining the scope of services provided in a federally subsidized program. Congress has decided to subsidize bread-and-butter lawsuits on behalf of individuals seeking benefits under existing welfare laws, but not broad-ranging litigation challenging welfare reform. This selective subsidy insures that federally funded lawyers help welfare claimants obtain all the benefits to which they are entitled under existing law, in accordance with the fundamental purpose of the LSC program: to provide basic legal services to the indigent.

In declaring this "suit-for-benefits" limitation impermissible viewpoint-based discrimination under the First Amendment to the United States Constitution, the Second Circuit misconstrued the limitation and the governing First Amendment decisions of this Court.

The suit-for-benefits limitation restricts *services*, not *speech*. When prospective clients consult lawyers in the LSC program, there are no restrictions on the dialogue between

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[6] This Court has not ruled on Respondents' petition, which sought review of that part of the Second Circuit's decision which unanimously affirmed the district court's denial of the preliminary injunction motion.

them. The LSC lawyers can advise potential clients of their right to challenge a welfare reform law. The LSC lawyers can also refer potential clients to non-LSC lawyers who can undertake such representations. And these non-LSC lawyers, who may be affiliated with LSC grantees, can file these lawsuits. Thus, the suit-for-benefits limitation does not restrict the speech of the LSC grantee, lawyer, or client; it restricts only the services that can be provided within the scope of the federal program.

A limitation on federally subsidized services does not violate the First Amendment. Congress has broad power to decide how federal funds are spent. Congress also has the power to apply limitations on federal funds to activities conducted with non-federal funds; if federal restrictions applied solely to grantees' use of federal funds, then grantees could re-configure their books to use federal funds to subsidize *indirectly* precisely those activities that Congress chose not to subsidize directly. In recognition of these powers, this Court has long distinguished between valid decisions not to subsidize the exercise of a constitutional right, on the one hand, and "unconstitutional conditions" that over-burden the exercise of a constitutional right, on the other.

Limiting the services offered in a federal program falls on the safe side of this line. In *Rust v. Sullivan*, 500 U.S. 173 (1990), this Court sustained a federally funded family planning program that excluded abortion-related services. Even the dissenting justices in *Rust* agreed that Congress has broad power to limit the services provided in a federal program; the *Rust* dissenters objected primarily to independent limitations on speech imposed on doctors and patients in the program (*id.* at 206, n.1)—speech-related restrictions that are notably absent from the suit-for-benefits limitation at issue here. In fact, the suit-for-benefits limitation, unlike the federal restrictions construed in *Rust*, does not prevent LSC-funded lawyers from advising prospective clients of their

right to challenge welfare reform laws. As a result, prospective LSC clients are absolutely free to pursue such lawsuits outside the LSC program and without federal funding.

The Second Circuit side-stepped these principles by construing the suit-for-benefits limitation as "viewpoint discrimination" against one of the "most protected categories of speech" in a "public forum." All three prongs of this holding are erroneous, as we explain below.

Congress did not create the LSC program "for use by the public as a place for expressive activity." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983). The LSC program is intended to provide specific services to the poor. Within this carefully defined program, Congress may validly subsidize legal assistance for individuals seeking benefits under existing welfare laws, but not for individuals seeking to change the welfare laws.

By the same token, a lawyer's argument to a court—even an argument that a welfare reform law is unconstitutional or illegal—is not a critique of governmental policy that represents an exercise of the lawyer's First Amendment rights; the lawyer's argument is merely a service for a client seeking relief. Thus, the suit-for-benefits limitation does not infringe the constitutional rights of the lawyer, or, for that matter, of the client, who remains free to challenge welfare reform without the federal subsidy.

Nor can the suit-for-benefits limitation be considered viewpoint discrimination. Helping welfare claimants obtain their full share of benefits does not, as the Second Circuit held, "discourage challenges to the status quo" (Pet. App. (99-603) at 24a); it simply helps the status quo (*i.e.*, the current welfare system) operate more smoothly. The First Amendment's prohibition on viewpoint discrimination does not also require Congress to subsidize the attempted overhaul of its welfare system.

For these reasons, this Court should reverse the Second Circuit's decision to invalidate the suit-for-benefits limitation.

ARGUMENT

A. Congress Has the Power to Selectively Subsidize Services Offered in a Federal Program

In a long series of decisions culminating in *Rust*, this Court has recognized the government's power to select some activities to subsidize, but not others, without violating individuals' rights to engage in the unsubsidized activities.

For example, in the First Amendment context, a selective subsidy does not infringe the constitutional rights of the unsubsidized person unless the refusal to subsidize is "aimed at the suppression of dangerous ideas." *Cammarano v. United States*, 358 U.S. 498, 513 (1959). In *Cammarano*, corporate taxpayers challenged an IRS regulation that excluded lobbying expenses from the definition of "ordinary and necessary expenses" that are deductible from a corporate taxpayer's income. The taxpayers argued, among other things, that they were being denied a deduction as punishment for engaging in their First Amendment right to lobby. This Court rejected the taxpayers' challenge, holding:

> Petitioners are not being denied a tax deduction because they engage in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets, as everyone else engaging in similar activities is required to do under provisions of the Internal Revenue Code.

Id.

In so holding, the *Cammarano* Court drew a critical distinction between a selective subsidy that validly controlled the use of governmental funds, on the one hand, and a

refusal to subsidize that imposed an "unconstitutional condition" on the exercise of unrelated constitutional rights (distinguishing *Speiser v. Randall*, 357 U.S. 513 (1958)).

Similarly, selective subsidies of pregnancy-related services but not abortion-related services do not violate a woman's constitutional right to decide whether to terminate a pregnancy, as long as the selective subsidy does not actually create an "obstacle" to the exercise of the woman's constitutional right. *Maher v. Roe*, 432 U.S. 464, 474-77 (1977); *Harris v. McRae*, 448 U.S. 297, 315-18 (1980). This rule is based on the principle that Congress has the power to promote some approaches to pregnancy over others.

To enforce a selective subsidy, the government also has the power to impose restrictions on the use of private funds as well as public funds; since money is fungible, restricting the use of only public funds might allow a recipient to use the public funds to conduct precisely the activities the government did not intend to promote.

In *Regan v. Taxation with Representation*, 461 U.S. 540 (1983) ("*TWR*"), a non-profit organization challenged the section of the Internal Revenue Code that denied tax-exempt status to non-profit organizations that engaged in "attempting to influence legislation." This Court unanimously held that the government's refusal to subsidize these lobbying activities did not violate the First Amendment because the statute was not "aimed at the suppression of dangerous ideas." *Id.* at 546-51 (citing *Cammarano*). This Court explained:

> The issue in these cases is not whether TWR must be permitted to lobby, but whether Congress is required to provide it with public money with which to lobby. For the reasons stated above, we hold that it is not.

Id. at 551.

In a concurring opinion, three justices emphasized that in their view, the statute threatened an unconstitutional condition because it withheld tax-exempt status not only for the lobbying activities that Congress did not want to subsidize, but also for all the other activities conducted by otherwise eligible organizations. *Id.* at 552. In the concurring justices' opinion, the statute was constitutional only because a separate subsection of the Internal Revenue Code permitted non-profit organizations to create affiliate organizations to engage in the disfavored lobbying activity; according to the concurrence, this alternative "channel of communication" rendered an otherwise unconstitutional statute constitutional. *Id.* at 552-54.

A year later, in *FCC v. League of Women Voters of California*, 468 U.S. 364 (1984) ("*FCC*"), this Court considered the same problem in the context of a cash subsidy. A non-profit corporation that owned several noncommercial educational broadcasting stations challenged a federal statute that forbid such stations from engaging in "editorializing," even if the editorializing was financed by non-federal funds. A 5-4 majority of this Court struck down the statute, because, among other things, the restriction on the use of non-federal funds was not ameliorated by the existence of alternative channels of expression, as in *TWR*. If, however, the statute had "permitted noncommercial educational broadcasting stations to establish 'affiliate' organizations which could then use the station's facilities to editorialize with nonfederal funds, such a statutory mechanism *would plainly be valid. . . .*" *Id.* at 400 (emphasis supplied). Taken together, *TWR* and *FCC* uphold the application of federal restrictions to activities conducted with non-federal funds, as long as the government allows alternative channels for the exercise of the unsubsidized rights.

In *Rust* v. *Sullivan*, 500 U.S. 173 (1991), this Court applied all these principles to a federally funded services

program known as Title X. Title X appropriated funds for distribution to family-planning services, but provided that "[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning." *Id.* at 178. In 1988, the Secretary of Health and Human Services ("HHS") promulgated new implementing regulations that expanded the scope of this restriction on abortion by prohibiting recipients of federal funds from encouraging, promoting or advocating abortion, either to their patients or in lobbying. Under these regulations, doctors and nurses were expressly prohibited from recommending abortion to a patient or from referring a patient to an abortion provider. *Id.* at 179-80. Moreover, to insure that federal funds did not indirectly subsidize abortion-related activities, the HHS regulations required a recipient of federal funds to conduct any abortion-related activities through an affiliate that was physically and financially separate from the federal program. *Id.* at 180-81.

This Court resoundingly upheld the HHS restrictions, at least insofar as the government was limiting the *services* the subsidized program could provide. As the majority opinion put it:

> There is no question that the statutory prohibition [on abortion-related activity in the context of the Title X program] is constitutional. . . . The Government can, without violating the Constitution, *selectively fund* a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. *In doing so, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other.* A legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right. . . . A refusal to fund protected activity, without

> more, cannot be equated with the imposition of a penalty on that activity.

Rust, 500 U.S. at 192-93 (internal quotations and citations omitted) (emphasis added).

Even the dissenters agreed that the limitation on services was constitutional under then governing law. In the words of Justice Blackmun's dissent (which was joined, in relevant part, by Justices Marshall and O'Connor):

> Were the Court to read [the statute] to prohibit only the actual performance of abortions with Title X funds . . . the provision would fall within the category of restrictions that the Court upheld in *Harris* v. *McRae* and *Maher* v. *Roe*. By interpreting the statute to authorize the regulation of abortion-related speech between physician and patient, however, the Secretary, and now the Court, have rejected a constitutionally sound construction in favor of one that is by no means clearly constitutional.

Id. at 206 n.1. Thus, the dissenters objected not so much to the limitation on services, but to the "gag order" that skewed the information that doctors and nurses could provide their patients. *Id.* at 211 (stating that regulations "manipulat[ed] the content of the doctor-patient dialogue . . .").

The majority, of course, upheld even the restrictions on speech, reasoning that they were merely incidental to the restricted services. *Id.* at 195 ("But we have here not the case of a general law singling out a disfavored group on the basis of speech, but a case of the Government refusing to fund activities, including speech, which are specifically excluded from the scope of the project funded."). Thus, the majority distinguished this governmental limitation on services (a context in which the government could regulate the services and thus the incidental speech) from a governmental limitation on speech.

The *Rust* Court also upheld the restrictions even as they applied to activities funded by non-federal sources, holding that HHS's program integrity regulations permitted adequate alternative channels for Title X grantees to conduct abortion-related activities with other funds. In so holding, this Court held that it was reasonable to require the Title X grantee's affiliate to be physically separate from the grantee to avoid the appearance that Congress was funding the affiliate. *Rust*, 500 U.S. at 187-91. The Court also held that it was permissible to require the affiliate organization to be financially separate from the Title X grantee because "Congress' power to allocate funds for public purposes includes an ancillary power to ensure that those funds are properly applied to the prescribed use." *Id.* at 195 n.4. In sum, the Court held that the program integrity regulations allowed a Title X grantee to "continue to perform abortions, provide abortion-related services, and engage in abortion advocacy; it simply is required to conduct those activities through programs that are separate and independent from the project that receives Title X funds." *Id.* at 196; *see also id.* at 199 n.5.

B. The Court of Appeals Erroneously Disregarded *Rust* and its Antecedents

Rust squarely governs this case. In both cases, Congress provided a federal subsidy to promote certain basic services for the poor (medical services in connection with family planning, legal services in connection with suits for welfare benefits). In both cases, Congress decided not to subsidize certain other types of services (abortion, efforts to challenge welfare reform). In both cases, to prevent the subsidy from being used for the unsubsidized purposes, Congress decided not to provide the subsidy to service providers who engage in the unsubsidized activities even with non-federal money. And, finally, in both cases, the relevant administrative organization (HHS, LSC) adopted virtually identical policies to allow recipients of federal funds to affiliate themselves with

separate organizations that engage in the restricted activities. As Justice White wrote in *LASH III*, "there is no basis for distinguishing this case from *Rust*." 145 F.3d at 1024.

If anything, this case is more clear-cut than *Rust*. The suit-for-benefits limitation restricts only the services that lawyers can provide, not the advice they can give their clients. Potential LSC clients can have a full consultation with an LSC lawyer, even if they ultimately decide to bring a case that the LSC lawyer cannot handle within the confines of the LSC program. The lawyer's speech is not restricted or compelled; the client leaves the consultation completely informed; the lawyer-client dialogue is not distorted.

Because the prospective client receives full and independent advice, the prospective client's ability to challenge welfare reform law is not hampered. Rather, the prospective client is merely required to challenge welfare reform law through lawyers who are not federally subsidized.

The Court of Appeals for the Second Circuit recognized *Rust's* potential applicability, but refused to follow it. Instead, the court of appeals dismissed *Rust's* holding as "a judicial precedent in a relatively unexplored area of law," and its critical paragraph as "words" that cannot "reliably be taken at face value." Pet. App. (99-603) at 25a.

As this Court's opinion clearly indicated, however, *Rust* was the culmination of more than three decades of precedents on the issue of governmental subsidies. *Rust* explicitly incorporated the principles articulated by this Court from *Cammarano* through *FCC*. 500 U.S. at 192-200.

And *Rust's* continuing vitality was recently reaffirmed in *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998) ("*Finley*"). In *Finley*, performance artists and an artists' organization challenged a federal statute that required the Chairperson of the National Endowment for the Arts, in allocating federal subsidies to artists, to "tak[e] into

consideration general standards of decency and respect for the diverse beliefs and values of the American public." By an 8-1 majority, this Court rejected the artists' claim, relying on the central language of *Rust*, quoted above at pp. 22-23. *Finley*, 524 U.S. at 587-88. *Rust* cannot be given the back of the hand.

C. The LSC Program Is Not a Public Forum for the First Amendment Expression of Lawyers or their Clients

In refusing to follow *Rust*, the court of appeals tried to shoehorn the suit-for-benefits limitation into the analytical framework of *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995).

In *Rosenberger*, a student organization challenged the University of Virginia's refusal to subsidize publication of their student newspaper; the University had decided to withhold a subsidy that was generally available to all student groups solely on the ground that the group's newspaper promoted religious activity. This Court held that the state university's decision not to fund religious speech was impermissible viewpoint-based discrimination because the University had created a limited public forum—a student activity fund designed to subsidize extracurricular activities, including the dissemination of student newspapers and other publications—and then discriminated on the basis of viewpoint within that public forum. *Rosenberger*, 515 U.S. at 833-34. The Court thus distinguished *Rust* (and its antecedents) on the ground that in *Rust* the government "used private speakers to transmit specific information pertaining to its own program," whereas in *Rosenberger* the University "create[d] a program to encourage private speech." *Id.*

To analogize the suit-for-benefits limitation to the University's decision in *Rosenberger*, the court of appeals

misconstrued the suit-for-benefits limitation as "viewpoint-based discrimination" against the "most protected form of expression" in a "public forum." All three premises of this analogy are flawed.

1. The LSC Program Is Not a Public Forum

The court of appeals first erred in holding that the suit-for-benefits limitation restricts speech in a "public forum," *i.e.*, courtrooms that are the "prime marketplace" for the idea that a welfare law is unconstitutional or illegal.

As a starting point, the relevant forum to be analyzed is the forum *created* by the federal subsidy, not a forum that exists separate and apart from the federal subsidy. As this Court explained in *Finley*: "We held [in *Rosenberger*] that by subsidizing the Student Activities Fund, the University had *created* a limited public forum, from which it impermissibly excluded all publications with religious editorial viewpoints." *Finley*, 524 U.S. at 586 (emphasis supplied). *Cf. Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 800-01 (1985) (when non-profit organizations challenged denial of access to charity drive program for federal employees, the relevant forum was the federal charity drive program, not the federal workplace as a whole).

Under this analysis, the forum in this case is not the courtroom or some other forum that exists independent of the LSC program and in which only a portion of LSC grantees' activities take place; the forum is the LSC program itself.

And the LSC program cannot be construed as a public forum, limited or otherwise. While the subsidy in *Rosenberger* was offered to all student organizations in a university setting, for the precise purpose of promoting expression, LSC's subsidies are offered to a limited universe of eligible legal aid organizations, for the very different purpose of providing services. As Justice White wrote for the Ninth Circuit in *LASH III*:

> Appellants rely on *Rosenberger* to support their claim that the LSC is a program designed to encourage private speech and therefore the restrictions are subject to heightened scrutiny. This analogy to *Rosenberger* is not persuasive. The government in *Rosenberger* "expend[ed] funds to encourage a diversity of views from private speakers," unlike the LSC program where "the government [has] appropriate[d] public funds to promote a particular policy of its own." Like the Title X program in *Rust*, the LSC program is designed to provide professional services of limited scope to indigent persons, not to create a forum for the free expression of ideas.

LASH III, 145 F.3d at 1028 (citations omitted).

Since LSC's subsidies are designed not to promote private speakers' expression, as in *Rosenberger*, but to advance the government's own policies, as in *Rust*, the First Amendment mandates of *Rosenberger* are inapposite. "When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy." *Board of Regents of Univ. of Wisconsin* v. *Southworth*, 120 S. Ct. 1346, 1357 (2000).[7]

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[7] Even if the courtroom were the relevant focus of the forum analysis, the courtroom is not a public forum. "A courtroom is not a debate hall or gathering place for the public to exchange ideas; it is a forum for adjudicating the rights and duties of litigants." *Kelly v. Municipal Court*, 852 F. Supp. 724, 734-35 (S.D. Ind. 1994), *aff'd*, 97 F.3d 902 (7th Cir. 1996). *See also Zal v. Steppe*, 968 F.2d 924, 932 (9th Cir. 1992) (Trott, J., concurring) ("[A] courtroom is not a public forum in the technical sense that this terminology is used in free-speech analysis.").

2. The Suit-for-Benefits Limitation is At Most Content-Based, Not Viewpoint-Based Discrimination

The Second Circuit also erred by holding that the suit-for-benefits limitation constitutes viewpoint-based discrimination that "clearly seeks to *discourage* challenges to the status quo." Pet. App. (99-603) at 24a (emphasis supplied).

Although the suit-for-benefits limitation does prevent LSC grantees from engaging in litigation to challenge a welfare reform law, it is also the fact that the LSC program does not fund anyone to advocate the contrary view, *i.e.*, that the welfare reform laws should be maintained as they are. As a result, the limitation is neutral as to whether the welfare reform laws should be changed or maintained.

At most, the suit-for-benefits limitation creates a content-based distinction that removes governmental funding from a certain category of activity—advocacy designed to change or maintain the existing welfare laws—in order to define the scope of the federal program—helping indigents obtain whatever benefits exist under prevailing welfare law. As this Court held in *Rosenberger*, a content-based limitation is entirely appropriate for this purpose:

> [I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.

515 U.S. at 829-30.

The distinction between content and viewpoint discrimination also undermines an analogy contained in the court of

appeals' opinion. The court of appeals considered it "inconceivable" that this Court would approve a hypothetical statute "to authorize grants funding support for, but barring criticism of, governmental policy." Pet. App. (99-603) at 26a. This imaginary statute is unlike the suit-for-benefits limitation, however, because the LSC program does not fund lawyers who support the current welfare reform regime any more than it funds lawyers who criticize that regime.[8]

A far more apt hypothetical was posed in the Second Circuit dissent. Judge Jacobs hypothesized a scenario whereby the Internal Revenue Service subsidized tax advice through outside accountants and tax lawyers, and then discovered that the tax lawyers were agitating for tax reform rather than helping to process individual taxpayers' returns. Pet. App. (99-603) at 39a. As Judge Jacobs put it:

> Congress could certainly plug that drain by specifying that the representation be limited to achieving the accurate computation of amounts due under the *present* tax code, and by barring advocacy aimed at, *inter alia*, tax reform, establishing the single tax or flat tax, or organizing constitutional litigation to challenge particular revenue provisions or the ratification of the 16th Amendment. Congress could do this, and if it did, the legislation would look like the restriction that the majority here holds unconstitutional.

Id.

Like this hypothetical tax program, the suit-for-benefits limitation does not operate to maintain the current welfare system; rather, it helps the current welfare system function

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[8] Moreover, the Second Circuit's hypothetical scenario plainly involves a subsidy designed to encourage speech, and thus create a limited public forum. As the contrast between *Rust* and *Rosenberger* makes clear, a subsidy to promote services is a different matter altogether.

more fairly. The First Amendment's prohibition against viewpoint discrimination does not oblige the government also to promote a very different political agenda: changing the welfare system.

3. Litigation Is Not a Specially Protected Form of First Amendment Expression for Lawyers or Clients

Finally, the court of appeals mistakenly held that litigation challenging governmental policy is one of the most protected forms of First Amendment expression. In so holding, the court of appeals apparently held that the suit-for-benefits limitation violates the First Amendment rights of *lawyers*.

But lawyers do not engage in litigation to vindicate their own constitutional rights. Litigation is a means to obtain relief for a client. A lawyer's argument is part of the package of services provided to the client, just as a doctor's advice concerning abortion is part of the package of services the doctor can provide to the patient. As Justice White, writing for the Ninth Circuit in *LASH III*, explained, the lawyers here are the means through which the Government "provide[s] professional services of a limited scope to indigent persons. . . ." *LASH III*, 145 F.3d at 1028.

Without a client who has an Article III case or controversy, the lawyer has no right to file a lawsuit, regardless of the lawyer's personal opinions on welfare reform. *See Zal*, 968 F.2d at 932 (Trott, J., concurring) ("In a courtroom, a lawyer without a client is like an actor without a part: he has no role to play, and no lines to deliver."). Indeed, a lawsuit filed solely for expressive purposes would be subject to dismissal. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992) (Article III standing requires injury in fact).[9]

[9] Moreover, although lawsuits obviously involve "speech," the court of appeals cited no authority for its contention that arguments

Thus, when a lawyer makes an argument on behalf of the client, the lawyer does not express his own views, let alone vindicate his own rights. *See Model Rules of Professional Conduct* Rule 1.2(b) (1995) ("A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."). As far as the First Amendment is concerned, the lawyer is transparent.

For First Amendment purposes, the only person who has a cognizable "viewpoint" here is the prospective client. It is the prospective client who seeks to challenge the welfare reform law to obtain benefits that were denied under that law. And it is the prospective client who has the right to bring a lawsuit to obtain that relief.

The suit-for-benefits limitation does not penalize the prospective client. Welfare claimants who want to bring lawsuits challenging welfare reform are free to bring such lawsuits outside the federal program, without federal funding. Their First Amendment claim is readily extinguished by the bedrock principle that "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right. . . ." *TWR*, 461 U.S. at 549.[10]

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in a courtroom designed to secure a *statutory* benefit for a welfare claimant rank higher in the pantheon of free speech than speech related to a woman's *constitutional* right to decide whether to obtain an abortion.

[10] Considering the lawyer and the client as a unit does not strengthen Respondents' claim. Although the Court in *Rust* speculated that an "all-encompassing" doctor-patient relationship could enjoy First Amendment protection from governmental regulation (500 U.S. at 200), even the Second Circuit held in this case that the LSC program did *not* create an all-encompassing lawyer-client relationship or the expectation of such a relationship. *See supra*, at 12-13. Moreover, the suit-for-benefits limitation does not interfere with the lawyer-client relationship; in certain circumstances, it simply prevents such a relationship from even being created.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals, insofar as it invalidated the suit-for-benefits limitation, should be reversed.

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